



# Self-Formalism, Precedent, and the Rule of Law

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## SELF-FORMALISM, PRECEDENT, AND THE RULE OF LAW

*Mark Tushnet\**

Last March I decided that, all things considered, my life would be better if I never ate any more chocolate.<sup>1</sup> In fact, I wrote it down in my notebook: "From here on, I have a rule against eating chocolate."

I followed that rule until September, when my sister came to town for a visit and we went out to a fancy restaurant for dinner. We had a terrific time, and she decided to finish the meal with a large chocolate dessert. I think it was called "Chocolate Decadence," so you can imagine what it was like. But she insisted that we share the pleasure by dividing the dessert. I thought about my rule and the circumstances I was in. I decided that I didn't have these precise circumstances in mind when I formulated my rule. Taking everything into account, including the pleasure I would get from making my sister happy by finishing the dinner with a shared dessert, I decided that, all things considered, I ought to eat some of the dessert.

I went back to my notebook after my sister left town. Now I wrote a revised rule: "I will not eat chocolate unless my sister is in town and she orders a chocolate dessert that she wants to split with me." I concluded that my life would be better, all things considered, if I followed *that* rule rather than the one I had written down in March.

I've been thinking about my rule against eating chocolate (except sometimes) since October. And I've gotten myself into a fix. Now I wonder about the following: why shouldn't I simply say to myself, "I

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\* Carmack Waterhouse Professor of Constitutional Law, Georgetown University Law Center. This Essay is prompted by reflections on three articles: Frederick Schauer, *Exceptions*, 58 U. CHI. L. REV. 871 (1991); Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987). I refer only occasionally to specific points made in those articles, but their arguments pervade my approach. I would like to thank Louis Michael Seidman for his comments on a draft of this essay.

1 I use "my life would be better" as a surrogate for whatever criteria I have for determining a course of action. The one criterion that requires special attention is this: "My life would be better if I followed the rules I have made for myself *no matter what*."

won't eat chocolate except when I conclude that, all things considered, my life will be better if I *do* eat it"? But I surely don't have a rule in place of any significance if that's the question I ask myself. At most I have a rule of thumb, or a presumption, against eating chocolate. But the presumption has no impact whenever I actually go through the exercise of trying to figure out whether, all things considered, my life would be better if I ate or refrained from eating chocolate on any particular occasion.<sup>2</sup> It's important to note that not having a rule against eating chocolate doesn't mean that I'll eat chocolate whenever I feel like it. I'm going to make a judgment every time the question comes up about whether it would be best, all things considered, for me to eat or refrain from eating chocolate. And lots of times that judgment will go against eating chocolate.

How would a *rule* against eating chocolate function? Of course there are always *reasons* not to eat chocolate, and I ought to abstain when the balance of reasons favors abstention. But the rule does not in itself provide reasons relating to health, happiness, and the like, for abstention. Indeed, it has to keep me from thinking about the reasons for abstaining or consuming for it to work as a *rule*. The rule, *qua* rule, would keep me from eating chocolate even in circumstances where my all-things-considered judgment (if I made one) was that my life would be better if I ate it. But it seems quite irrational for me to refrain from eating chocolate when I actually *have* an all-things-considered judgment that my life would be better if I ate it. At least that seems so if being rational means doing the things that make your life better.

So, I have to say to myself, "because I have a rule against eating chocolate, I won't even think about whether, all things considered, my life would be better if I ate some now," to satisfy even minimal standards of rationality. The rule keeps me from engaging in the full-scale evaluative process.

But I'm still puzzled. Is it any more rational to refrain from engaging in a full-scale consideration of what, all things considered, would be best for me, than it is to refrain from doing what, all things considered, I conclude would be best for me?

Of course I realize that last March I was in a particularly good position to determine what, all things considered, would make my life better. I'd seen my doctor recently, but not too recently, and he told me that it would be a good idea if I kept my weight down. But he didn't suggest that there was any serious immediate threat to my life if

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2 The presumption functions as a "bursting bubble," in the lingo of evidence law.

I didn't. And I hadn't gone through a recent binge of overindulgence in chocolate, so I wasn't feeling pangs of guilt.

But all that says is that I recognize that sometimes circumstances are particularly favorable for making accurate all-things-considered judgments. Today I have to consider two possibilities. The easier one is this: my circumstances now are not as favorable, so the all-things-considered judgment I make today will not actually be as accurate as the one embodied in my rule against eating chocolate. And, more important, *I know this*. That is, I have compared my circumstances now to the ones facing me in March, and I see that my present circumstances are likely to distort my current all-things-considered judgment. Making that judgment gives me a reason to follow my rule: the *reasons* I had then apply to me now, even though my first reaction was that they didn't.

The second possibility is more complicated. Here I think—erroneously—that my present circumstances are just as favorable as they were in March. My rule simply isn't going to help if I do. Again, the rule makes a difference if it not only bars me from making all-things-considered judgments, but also bars me from thinking about whether the circumstances under which I developed the rule were particularly favorable.

And again, this seems close to irrational: last March I was in one set of circumstances, today I am in another, and the rule tells me I can't ask whether my prior circumstances were particularly favorable. But then I literally have no reason to think that my prior judgment, embodied in the rule against eating chocolate, is better than my present judgment. (For all I know, my circumstances last March were particularly *unfavorable* to making a good all-things-considered judgment.) I would be deferring to a judgment made in the past simply because the past was a year ago, which hardly seems rational.

But perhaps I should defer to that judgment not because it was made in the past, but because it was made, *period*. I'm going to face lots of occasions on which I have to decide whether to eat chocolate, and in a huge proportion of them I'll conclude that I shouldn't, all things considered. The net betterness of my life will be higher if I simply follow a rule against eating chocolate, taking into account the loss I suffer from not eating chocolate when doing so would make my life better *and* the gains I accrue by saving time thinking about whether my present circumstances are better than last March's.

Now my only problem is that I actually don't have a rule against eating chocolate. I have a rule against eating chocolate except when I've gone out to dinner with my sister. But my deliberative process was one of first formulating a rule, then testing it against new circum-

stances to see whether I should make an exception in these circumstances—or, perhaps more accurately, whether I should reformulate my rule to take better account of the circumstances in which the question of eating chocolate arises.<sup>3</sup>

The possibilities of making exceptions and reformulating rules undermine my ability to economize on decisionmaking. I have to ask whether I ought to make an exception to the rule because new circumstances have arisen instead of asking whether I ought to depart from the rule because my decisionmaking capacity is better now than it was last March.<sup>4</sup>

The problem can arise in both directions: I can ask myself whether the rule I adopted in March really was, "*Never eat chocolate*," or whether it was, "*Never eat sweets*." Either formulation is *compatible* with the words written in my notebook, and both might make my life better, depending on a range of contingent facts about the world and my circumstances.

But this underestimates the importance of the rule's words. Surely, I might think, consulting my notebook won't make any difference at all if I'm trying to decide whether to order venison or veal at my dinner with my sister. "Chocolate" or "sweets" just aren't words relevant to that decision. Similarly, consulting the notebook won't help if, after deciding that my life would be better, all things considered, if I had some chocolate, I have to help my sister choose which of two rather attractive chocolate desserts we should share.

This conclusion isn't quite right either. I adopted my rule in March for some reasons, and those reasons *might* give me some guidance on the choice between venison or veal, or between the two chocolate desserts. But clearly it will take more thought for me to use my antichocolate rule to resolve those questions than it does for me to use it to refrain from having a Hershey® bar as an afternoon snack. In our ordinary discourse, the word *chocolate* doesn't immediately call forth to our minds a category that readily includes either venison or

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3 So, for example, it's not obvious why my "new" rule is against eating chocolate except when I'm going out to dinner with my sister: suppose I am visiting her; suppose she doesn't order a Chocolate Decadence dessert; suppose she doesn't indicate that she wants to share the dessert. What is the rule I developed when she visited me in September?

4 Cf. Jon Elster, *Weakness of Will and the Free-Rider Problem*, 1 ECON. & PHIL. 231, 261 (1985) (A person contemplating making an exception "could be justified in thinking that an exception could have bad precedence-setting effects, given his known psychological propensity to wishful thinking. He would then act rationally in taking precautions against his own known irrational tendencies.").

veal.<sup>5</sup> The rule's words, that is, make some work necessary if I am to pursue a course that in the end is better for me, all things considered. And, naturally, the cost of doing that work is something I have to build into my all-things-considered judgment.

For a while I thought that I was wondering about a problem of weakness of will, or *akrasia*, as the philosophers call it. But my problem is not really one of weakness of will, and the analysis of *akrasia* turns out to be unhelpful.

Jon Elster defines weakness of will as refraining from pursuing the course of action that you *know* is the better one.<sup>6</sup> And you know it is the better one at the time you actually make the decision to act. But my problem is that, as far as I can tell, my will isn't weak at all: I'm confident that my present all-things-considered judgment is at least as good as the one I made last March, even though it leads me to make a different decision about eating chocolate now.<sup>7</sup>

In addition, figuring out what to do in the face of weakness of will is tricky. Elster and Robert Cooter suggest that you can deal with weakness of will by "act[ing] through the external environment."<sup>8</sup> For

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5 In George Ainslie's terms, the category *chocolate* has "boundaries which cannot be moved just a little bit." George Ainslie, *Beyond Microeconomics. Conflict Among Interests in a Multiple Self as a Determinant of Value*, in *THE MULTIPLE SELF* 149 (Jon Elster ed., 1986).

6 Elster, *supra* note 4, at 250 ("Weakness of the will consists in acting against one's own better judgment, in doing what one believes, all things, considered, one should not do."); see also ALFRED R. MELE, *IRRATIONALITY: AN ESSAY ON Akrasia, Self-Deception, and Self-Control* 7 (1987) ("An action *A* is a *strict incontinent action* if and only if it is performed intentionally and freely and, at the time at which it is performed, its agent consciously holds a judgment to the effect that there is good and sufficient reason for his not performing an *A* at that time."); Jon Elster, *Introduction to RATIONAL CHOICE* 15 (Jon Elster ed., 1986) ("Akrasia is characterized by the following features. (1) There is a *prima facie* judgement that *X* is good; (2) There is a *prima facie* judgement that *Y* is good; (3) There is an all-things-considered judgement that *X* is best; (4) There is the fact that *Y* is chosen.").

7 That is, I don't experience myself as being "tempted" or "losing my head." Cf. Elster, *supra* note 4, at 252 (Weakness of will occurs when a person "loses his head when the temptation of the short-term reward becomes imminent."). Rather, I experience myself as fully reflective, aware of, but in the end rejecting, the possibility that I am indeed being tempted. Strikingly, Amélie Oksenberg Rorty, *Self-Deception, Akrasia and Irrationality*, in *THE MULTIPLE SELF*, *supra* note 5, at 120–21, describes habitual behavior as "[s]ometimes . . . the easy course," because it overrides my "occurrent motives." See also *id.* at 123–24 (discussing "the familiar, the habitual, the easy course").

8 Jon Elster, *The Impact of Rights on Economic Performance*, in *WESTERN RIGHTS? POST-COMMUNIST APPLICATION* 347, 354 (András Sajó ed., 1996). The utility of external agencies recurs in the relevant literature. See, e.g., Ainslie, *supra* note 5, at 144 (describing enforcement of private rules by "extrapsychic devices"); *id.* at 154

example, Cooter establishes that my life will be better overall if (a) I can create an agency that will prescribe an anti-chocolate-eating rule because I will be better off in the long run if I don't eat chocolate, and then (b) have the agency enforce the rule whenever I eat chocolate even though I don't actually suffer any immediate harm from my "lapse."<sup>9</sup> Unfortunately, I don't stand in that sort of external relation to myself.<sup>10</sup>

Cooter suggests another strategy. I will refrain from eating chocolate if I can somehow get myself into a mind-set where I really regret doing so.<sup>11</sup> The problem here is that I can't figure out how to do that. Elster elsewhere has described some states of mind as "essentially by-products"—ones "that . . . can only come about as the by-product of actions undertaken for other ends."<sup>12</sup> An enhanced capacity for regret seems to me to be such a state.

The question then is, what other ends might I pursue whose by-product is that enhanced capacity? Someone cleverer than I might be able to come up with a better candidate, but the best one I can imagine is something like, "The construction of a character as a person who always follows the rules."<sup>13</sup>

But here's the problem I have with that candidate: how can I go about cultivating such a character in a way that won't collapse under very slight pressure? My guess is that we develop characters as people who always follow the rules by always following them in small matters. *Before* we have become rule-following types, we follow the rules in small matters because we conclude that calculating what would be best all things considered just isn't worth the effort given the stakes. But

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(describing private rule against taking a break unless a friend invites me, and asserting "my problem is solved" "if my friend is a 'good' friend").

9 Robert D. Cooter, *Lapses, Conflict, and Akrasia in Torts and Crimes: Towards an Economic Theory of the Will*, 11 INT'L REV. L. & ECON. 149, 154 (1991). So, for example, I could hire you to rap me over my knuckles whenever I ate chocolate, but then you'd have to follow me around to check up on me.

10 Cf. Elster, *supra* note 4, at 257 (introducing external agency "amounts to changing the terms of the problem out of recognition"). Sometimes the metaphor of a "divided" self is useful for heuristic purposes, but in the end the metaphor can't be cashed out as an accurate description. For a collection of essays on this concept, see THE MULTIPLE SELF, *supra* note 5.

11 THE MULTIPLE SELF, *supra* note 5, at 158.

12 JON ELSTER, SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY 43 (1983).

13 Cf. Elster, *supra* note 4, at 258 ("[C]hoices in the present set up a mental *habit* or disposition that shapes future choices, and . . . present choices ought to take account of that effect."); Rorty, *supra* note 7, at 122-23 (describing role of character in motivating preferences). Note that this is also, but I think less interestingly, the character of a person who places value on following the rules no matter what.



gradually following the rules becomes second nature, and we don't do the calculation at all.

Unfortunately, the tiniest bit of self-consciousness undermines this strategy.<sup>14</sup> The problem is a cousin of the problem of exceptions: why don't I develop the character of someone who always follows the rules *when the stakes are small*? I have to decide which kind of person I am as soon as I confront a situation in which the stakes are higher, and at that point my state of mind is no longer a by-product.<sup>15</sup>

A second strategy focuses on the necessity to do conceptual work when the possibilities of developing an exception to a rule or of reformulating it arise. I won't do the conceptual work if I think of myself as a "plain-meaning kind of guy." Rules are straightforward linguistic statements whose meanings are apparent to me upon reading them.<sup>16</sup> Again my imagination may be limited, but I can't figure out how I could develop that self-understanding as a by-product of some other endeavor. And, again, self-consciousness about being a plain-meaning kind of guy undermines my ability to give reasons for rejecting reformulations of my initial rule.

I think the difficulty with these character-based accounts of how I might treat my March resolution as a rule is this: the character traits they invoke seek to make rule-following an activity that occurs without conscious awareness. But questions about rule-following arise whenever it occurs to me to wonder whether it makes sense to follow some particular rule, all things considered. Whenever it matters, then, the question of whether to follow a rule is always a matter about which I will be consciously aware.

The connection between these speculations and law should be reasonably clear. I have been examining whether my self at time<sub>1</sub> has

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14 Cf. David Pears, *The Goals and Strategies of Self-Deception*, in *THE MULTIPLE SELF*, *supra* note 5, at 70–71 (arguing that self-deception requires "functional insulation" of deceived subsystem from the deceiving one).

15 On the level of subjective phenomenology, I can report the following: I am a person who does indeed follow the rules nearly all the time, and sometimes I feel really foolish for doing so. One example is that I assiduously report as income every honorarium I receive, including those for reading manuscripts or doing tenure evaluations, even when I have not received a Form 1099-MISC from the people paying me the honorarium and even though I know that the Internal Revenue Service doesn't match these 1099 forms with reported income anyway. A family joke is that we say we ought to avoid doing anything that we wouldn't be willing to defend before a Senate confirmation committee, but in my case that is hardly a realistic possibility, and so it is not a realistic external constraint on my developing a character as a rule-follower.

16 Cf. MELE, *supra* note 6, at 126 (describing selective focusing as source of self-deception).

any claim to priority over my self at time<sub>2</sub>. Translated to the legal arena, we can see this as the problem of precedent.<sup>17</sup> At time<sub>1</sub> a court makes a rule. The function of the rule appears to exclude some matters from a decisionmaker's ken: it will follow the rule it has developed rather than engage in an all-things-considered judgment.

Schauer has established, at least to my satisfaction, that the rule-based strategy satisfies the demands of rationality when the court is saying something to someone else and believes that its target will do better overall if the target—a police officer, a city council, a state legislature—follows the rule and does not attempt itself to make an all-things-considered judgment. Of course the target will sometimes make mistakes—do things that, all things considered, make the world a worse place. But, Schauer argues, targets will also make mistakes in doing the all-things-considered calculation. And the world will be a better place if the court's rule produces fewer errors (or smaller errors) by targets than would directing targets to do the right thing, all things considered.

All this seems right to me. But it depends on a set of assumptions that seems to me problematic when we consider a court in relation to "itself," which is what is involved in a precedent system. My earlier discussion identified two characteristics of time-linked decisionmaking that made problematic my reliance on a prior rule. The first is a question about the *quality-linked circumstances* of decision: whether the circumstances under which the second decision is made are more favorable or less favorable to making good all-things-considered judgments. The second is a question about the *relevance-linked circumstances* of decision: whether it makes sense to forbear from examining whether the second decision would apply to different circumstances than the first.

There are a number of issues here. First, Schauer's defense of formalism works when the court is better at making the all-things-considered judgment than its target. After all, the court has to decide that, all things considered, the world would be better if the targets followed the rule the court articulates. But it seems incoherent for a court to say that it is better at devising a rule, all things considered, than *it* is at making an all-things-considered judgment. The court's target in a precedent system is, at first cut, *itself*, and it is quite hard for me to see how a court could think that it was better at making rules responsive to all-things-considered concerns than in making all-things-considered judgments.

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17 Elster describes this as a problem of intertemporal choice. Elster, *supra* note 4, at 234.

Perhaps, however, I am wrong in saying that the court's target is itself. Rather, its target is a court in the future.<sup>18</sup> And, it is easy to understand how a court might think that, no matter how good *it* is at making all-things-considered judgments, things are likely to degenerate. Later courts, the real targets of precedents, are not going to be as good as today's court.

On this view, precedent makes some sense. But not much, or at least only under quite restricted circumstances. Consider first a court making a rule to regulate the conduct of police officers. The court can expect its rule to be followed when it reasonably believes that officers will respond to the court's signals. And one way, perhaps the primary way, of inducing responsiveness is to *enforce* the rule. That is, the court induces responsiveness by imposing some sanction on non-complying officers until compliance becomes second nature.

But, once again, a court at time<sub>1</sub> is not in a position to induce compliance by a later court in the same way. When the time comes to apply the precedent, after all, the court that developed the precedent is no longer around. The new court is going to have to say to itself, "our predecessors developed the rule we are asked to apply today because they didn't think we were going to be very good at making all-things-considered judgments. And you know something? They were right."

I think we are entitled to be skeptical about how likely this response is as a general matter. Schauer suggests that the later court may say to itself, "[i]f Cardozo decided this way, who am I to disagree?"<sup>19</sup> Here the later court recognizes that a prior court was a higher quality court, and defers to its judgment. But notice how important is the fact that the later court refers to Cardozo, an extraordinarily eminent judge. Few judges are likely to say to themselves, "If Hiscock decided this way, who am I to disagree?"<sup>20</sup> Courts at time<sub>2</sub> are rather more likely to say to themselves, "We are just as good at making all-things-considered judgments as our predecessors were. (On the

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18 In Elster's terms, this is an interpersonal *and* intertemporal problem. *Id.* at 232.

19 Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 575 (1987). Schauer describes this as "conserv[ing] present decisional resources," but it seems to me more like deferring to the judgment of a particularly well-respected prior decisionmaker. *Id.*

20 Frank H. Hiscock served with Cardozo on the New York Court of Appeals. He was one of the sponsors of the Sherman Antitrust Act of 1890, and wrote a concurring opinion in *New York v. Gillogh*, 136 N.E. 317 (N.Y. 1922). See Stephen Botein, *Frank Harris Hiscock*, in *DICTIONARY OF AMERICAN BIOGRAPHY* 379 (John A. Garraty & Edward T. James eds., Supp. 4 1974).

whole, more of our predecessors were Hiscocks than Cardozos.) So we are going to decide whether, all things considered, we ought to follow the rule they articulated." And again the rule operates as no more than a rule of thumb. The *reasons* the court at time<sub>1</sub> had for developing its rule are equally available to the court at time<sub>2</sub>, and to the extent that *those* reasons support the rule the court at time<sub>2</sub> will rearticulate the rule. Not, however, because it is bound to do so by precedent, but because the rule makes sense, all things considered.

We might think that the court at time<sub>2</sub> would want to support a precedent system so that it could control courts at time<sub>3</sub>, time<sub>4</sub>, and so on. Just as the court at time<sub>1</sub> expected degeneration in quality, so can the court at time<sub>2</sub>. But the problem would simply recur: why would the court at time<sub>3</sub>, fools that they may be, think they were as stupid as the court at time<sub>2</sub> expected them to be?

The strategic problem facing the court at time<sub>1</sub> is this: the court has to assume that courts at time<sub>2</sub> and after will believe themselves to be no less smart than the court at time<sub>1</sub>. It is unable to enforce the rules directly by imposing sanctions on the later courts. It has to develop some way of inducing compliance nonetheless. As before, the best candidate is probably to attempt to induce in later courts a habit of rule-following. And, as before, it is unclear to me how the court at time<sub>1</sub> can do that. Of course *it* can follow the precedents handed it, and hope that its rule-following behavior will induce later courts to follow the rules *they* are handed. But in doing so the court at time<sub>1</sub> forgoes any chance it has to make the very rules it hopes to hand on to later courts. Any effort to innovate shows later courts that they too can innovate, and perhaps with respect to the rule the court at time<sub>1</sub> cares most about. Finally, to the extent that inducing behavior in a target by one's own behavior is undermined by the target's self-consciousness about what is occurring, it is worth noting that legal procedures force self-consciousness upon the courts, as adversaries bring to their attention competing ways of understanding the rules they must interpret and then apply.<sup>21</sup>

Consider next the relevance-linked circumstances of decision. Suppose a court is asked to decide whether a state law barring indigent recent arrivals from receiving emergency medical care violates the Constitution. A judge proposes to write an opinion invalidating

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21 In Pears's terms, the adversary system routinely undermines the functional insulation that can sustain the process of inducing the target's behavior by one's own. Pears, *supra* note 14. In Ainslie's terms, the adversary system precludes the possibility of controlling a court's attention by keeping the opportunity for distinguishing situations out of sight. Ainslie, *supra* note 5, at 144.

the state law on the ground that it violates a constitutionally protected right to travel. Concerned about the national government's ability to regulate travel to and from other countries, another judge objects that there is no generalized right to travel, but only a right to interstate travel. The opinion as published finds the statute unconstitutional as a violation of a protected right to interstate travel.

Ten years later a lower court is asked to decide whether a national statute barring travel to countries designated by the Secretary of State as terrorist nations is unconstitutional. The judge can use the medical care case as a precedent to uphold the statute or invalidate it. The prior case recognized *only* a right to interstate travel, the judge might say, and thereby implicitly rejected the broader constitutional claim necessary to support the challenge here. Or, the judge might say, the prior case rested on a broad right to travel, formulated as a right to interstate travel only because that was the context in which the medical care case arose.

The techniques our later judge would deploy are boringly familiar—second nature, one might say. And they are quite generally available. Suppose, for example, that the international travel case came up first, and the court held the statute unconstitutional. Even that would not require the later judge to invalidate the medical care statute. That statute implicates federalism concerns that were absent in the international travel case, the later judge could fairly say, and the need for states to control their treasuries outweighs individual interests in interstate travel even though that national interest in responding to terrorism does not outweigh individual interests in international travel. Nor are these cases intrinsically “travel” cases only. On the broadest level they can later be taken to deal with aspects of personal liberty best described as the interest in autonomous control over important life decisions.

It would seem, then, that the rule articulated at time<sub>1</sub> can't *control* a decision at time<sub>2</sub>. But of course it can *influence* such a decision. Sometimes it can do so because it just isn't worth anyone's effort to try to distinguish the precedent. True, a different or modified rule might make the world a bit better (although it might not), but the marginal gain isn't large enough to overcome the cost of working out the new rule. Note, however, that here the precedent doesn't give the later court a *reason* for acting other than saving time and energy.

Precedents can influence later decisions in a different way. Suppose the marginal gain from a new rule would be substantial rather than small. Precedents might sometimes block us from realizing that

gain.<sup>22</sup> The work needed to distinguish the precedents might be quite substantial as well. Decisionmakers pressed to do many things might think it inappropriate to devote too much effort to figuring out how to maneuver among the precedents in any particular case.<sup>23</sup>

There are at least two ways in which this might happen. As I suggested earlier, the rule articulated at time<sub>1</sub> might use terms that require the later court to do a lot of conceptual work to distinguish or extend the rule. In addition, I used the plural term *precedents* here to suggest that the influence of precedents may increase as they accumulate. The idea is that the accumulated precedents might increasingly narrow the range within which a later court can maneuver. It's relatively easy to distinguish one case, much harder to distinguish five or ten. The difficulty with this argument is that it takes time for precedents to accumulate. And over time, the earlier precedents have decreasing influence—the argument that the earliest precedent was decided under circumstances relevantly different from the one we now face becomes increasingly powerful.

So far I have proceeded on the assumption that we have no external agency that can sanction judges who fail to follow precedent. Perhaps, however, we should understand the practices through which judges are first socialized as lawyers and then selected as judges to be such an agency. Roughly speaking, nearly every person who becomes a judge will believe that precedent really does and should constrain (sometimes and to some degree).<sup>24</sup> If the interpretive moves of distinguishing and generalizing are second nature to judges, so is the sense of constraint by precedent (again, sometimes and to some degree).

On this view, precedent sometimes constrains to some degree, but not because the *existence* of a precedent provides a *reason* for adhering to it. This may have implications for the form in which we could defend the rule of law ideal. Some defenses of that ideal rest on the proposition that we are properly governed by law because, and to

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22 Of course, this would appear to undermine the argument that precedents contribute to overall well-being.

23 This may be particularly so if the later court is not as clever as the first court. Even if the later court doesn't recognize its relative stupidity, its stupidity may manifest itself as an inability to do the conceptual work needed to distinguish the precedents. I should note, however, that a stupid later court might simply get impatient with the work, throw up its hands, and write a shoddy opinion that fails to satisfy a reasonable lawyer's demand for adequate treatment of the precedents.

24 For completeness, one would have to establish that the presence of rare exceptions would not transform the judicial institution.

the extent that, law provides reasons that all reasonable people in an appropriate frame of mind should accept.<sup>25</sup>

That defense would not seem available under the view developed here. Consider for example a criminal defendant whose claim is rejected by a judge whose reasons for affirming the conviction rest ultimately on the ground that following precedents is generally a sensible way to economize on decisional resources. From the defendant's point of view, the judge is saying, "You are going to prison because I am too lazy to do the intellectual work that would be needed to show that your claim is legally justified." I doubt that this would satisfy the demands of the rule-of-law defense I have described.

Other defenses rest on the more modest proposition that we are properly governed by law because, and to the extent that, decisionmakers are constrained to act on grounds other than their personal preferences. That defense remains available.

But, it seems to me, that defense resonates far less than the first one, at least in today's political-legal culture. If judges are constrained not by reason but by socialization, in today's culture it seems natural to observe that judges are demographically unrepresentative and socialized into a way of thinking that many find curiously truncated, even if it does keep them from simply forcing their personal preferences on the rest of us. These observations may weaken the claims that law has on us. To that extent they are compatible with legal positivism's general program of replacing the conceptual connection between law and morality offered by some accounts of law, with a connection that is at most contingent and always contestable.

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25 I have sometimes thought that the next article in Schauer's series of articles with single-word titles should be "Law," in which he would directly confront the implications of his analyses for the defense of the rule of law. In my view, his articles each edge up to the conclusions I draw here, but then retreat, in part by making essentially empirical assertions about, for example, the constraining force of the categories embedded in the words lawyers use. I should note, for completeness, that Schauer does not *reject* the conclusions I draw; he simply does not take his analysis to what seems to me the logical next stage.

